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Supreme Court, U.S.
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No. 97-77 JUL 8 1997.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ROBERT AYERS, JR., Warden, *Petitioner*,

v.

TROY ISAIAH MITCHELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *United States v. Powell*, 469 U.S. 57 (1984), allow a reviewing court to reverse a murder conviction on grounds of insufficient evidence when the court refused to consider any evidence that Mitchell used a gun or drove the murder car because the jury failed to find the personal gun use and driving allegations to be true beyond a reasonable doubt?

2. Is the rule announced by the Ninth Circuit Court of Appeals in this habeas corpus case -- that in assessing the sufficiency of the evidence to support a murder conviction, the reviewing court could not consider evidence that Mitchell used a gun or drove the murder car because the jury found the personal gun use and driving allegations to be "not true" -- a "new" rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989)?

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Robert Ayers, Jr., Warden, of the High Desert State Prison at Susanville, California, ("the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1/]

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported as *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997). The order of the Ninth Circuit, denying rehearing and amending the opinion, is also reported as *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997), and is reproduced in Appendix A. The judgment of the United States District Court for the Central District of California, which denied the petition for writ of habeas corpus, is unreported. The judgment is reproduced and attached as Appendix B. The order of the California Supreme Court, denying Mitchell's petition for review is unpublished, and is reproduced in Appendix C. The opinion of the California Court of Appeal, Second Appellate District, Division Two is unpublished and is reproduced in Appendix D.

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1. Mitchell was last held in custody by Robert Ayers, Jr., the Warden at the High Desert State Prison in Susanville, California. Thus, Robert Ayers, Jr. has replaced K.W. Prunty, the Warden of the California State Prison, Calipatria, Mitchell's former custodian, as the proper Petitioner in this case.

STATEMENT OF JURISDICTION

The opinion below was filed on February 26, 1997, and amended on April 10, 1997. The Ninth Circuit denied the Warden's petition for rehearing and suggestion for rehearing *en banc* on April 10, 1997.[2/]

Respondent Mitchell first invoked federal court jurisdiction in his habeas corpus case under 28 U.S.C. § 2254. The Warden now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 2254 of title 28, United States Code, provides in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

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2. The Warden filed a second petition for rehearing and suggestion for rehearing *en banc* on April 24, 1997, which is still pending before the Ninth Circuit. On April 24, 1997, the Ninth Circuit issued the mandate and Mitchell was released from prison. This petition is filed within the earliest 90-day filing deadline possible, based on the Ninth Circuit's April 10, 1997, denial of the Warden's first petition for rehearing, in case the Ninth Circuit refuses to accept the Warden's second petition for rehearing at some later time. The Warden has also filed a concurrent request for this Court to recall and stay the mandate pending resolution of this case.

Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

In Mitchell's 1990 murder trial, witnesses testified that Mitchell was on a balcony with several other gunmen when they all opened fire on a rival gang member, standing in the street. Mitchell and his fellow gang members got into two cars, and Mitchell drove over the victim. Mitchell was convicted of second degree murder. The jury found two allegations to be "not true," that Mitchell personally used a gun, and that Mitchell was the

driver of the car which drove over the victim.[3] (RT 39-148, 182, 247-49, 380-83.)

Mitchell appealed his conviction and argued, inter alia, there was insufficient evidence he aided and abetted in the murder, and the court's instruction on aiding and abetting violated his due process rights. The California Court of Appeal affirmed Mitchell's conviction, stating that while the jury did not find beyond a reasonable doubt that Mitchell personally used a firearm or that he was the driver of the vehicle, it did not mean the jury completely discounted the witnesses' testimony as to Mitchell's personal involvement. "Credibility of the witnesses and the weight to be given their testimony is a determination for the jury." (App. D at 6.) Additionally,

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3. The jury was instructed, inter alia:

"It is alleged in count one that the defendant Troy Mitchell personally used a firearm during the commission of the crime charged. If you find the defendant Troy Mitchell guilty of the crime charged or a lesser and included felony offense, you must determine whether the defendant Troy Mitchell personally used a firearm in the commission of such felony.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

"If you find the defendant Troy Mitchell guilty of murder in the first degree or second degree, you must also determine whether the defendant Troy Mitchell drove the vehicle which ran over the alleged victim named in the information, Jerry Knox.

"If you have a reasonable doubt as to whether or not the defendant Troy Mitchell was the driver, you will record on the verdict form provided for the special finding on the issue that it is not true.

"If you agree unanimously that defendant Troy Mitchell was the driver, you will record on the verdict form that it is true." (RT 526-28.)

the court found other evidence corroborated the witnesses' testimony and supported the murder verdict. (App. D at 6-7.) Mitchell's petition for review in the California Supreme Court was denied without citation to authority. (App. C.)

In September 1993, Mitchell filed a habeas petition with the United States District Court, raising the same issues. The District Court Judge adopted the recommendations of the Magistrate Judge and dismissed the petition with prejudice. The district court denied Mitchell's request for a certificate of probable cause. The Ninth Circuit granted Mitchell a certificate of probable cause, and appointed counsel.

In its published opinion, two members of the Ninth Circuit panel found that because the jury found the allegation that Mitchell personally used a gun to be "not true," and found the allegation that Mitchell drove the car over the victim to be "not true," Mitchell could be guilty of murder "- if at all - only as an aider and abetter." *Mitchell v. Prunty*, 107 F.3d 1337, 1340 (9th Cir. 1997). The panel further found that aside from the witnesses' testimony as to Mitchell's direct involvement, a theory rejected by the jury, there was no remaining evidence from which a rational jury could have found Mitchell aided and abetted in the murder. *Id.* at 1342. The dissent stated the circumstantial evidence and the logical inferences to be drawn therefrom were sufficient for a rational jury to find Mitchell intentionally aided and abetted in the murder. *Id.* at 1342, 1344.

The Warden filed a timely petition for rehearing and suggestion for rehearing en banc, arguing the seemingly inconsistent jury verdicts, which found Mitchell guilty of murder without personal involvement, did not allow the Ninth Circuit to disregard evidence Mitchell shot and drove over the victim in determining whether sufficient evidence supported the murder conviction. The Warden, citing *United States v. Powell*, 469 U.S. 57 (1984),

argued the court must review *all* the evidence independently of the jury's determination that some of the evidence was insufficient to prove other allegations.

The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc, and issued an amended opinion. In the amended opinion, the majority held the jury's findings were dispositive to the questions presented to them, namely Mitchell did not personally use a gun and did not drive the car over the victim. *Mitchell v. Prunty*, 107 F.3d at 1139 n.2. Therefore, evidence contrary to the jury's "special findings" should not be considered in determining whether sufficient evidence supported Mitchell's conviction for second degree murder.

On April 24, 1997, the Warden filed a motion to recall and stay the mandate, and filed a second petition for rehearing and suggestion for rehearing en banc to address the new rule raised in the Ninth Circuit's amended opinion, namely the court's ruling that "not true" findings of criminal allegations constitute ultimate findings of fact. The Ninth Circuit denied the motion to recall and stay the mandate. (App. E.) Mitchell was released from prison. The second petition for rehearing is still pending.[4]

REASONS FOR GRANTING THE PETITION

This case requires the Court to decide what effect "not true" jury findings have on other counts against a defendant. In the instant case, twelve jurors found Mitchell guilty of murder. A unanimous three-justice panel of the California Court of Appeal, a federal magistrate judge, a federal district court judge, and one

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4. *See supra* note 2.

judge on the Ninth Circuit panel found sufficient evidence to support Mitchell's murder conviction.

The published opinion in *Mitchell* creates a new precedent for reviewing the sufficiency of the evidence claims by removing from consideration any evidence underlying an unproven allegation. This new analysis has the potential to reverse countless convictions where allegations such as sentencing enhancements are alleged, but not proven beyond a reasonable doubt. The state is then without recourse because a defendant cannot be retried after a reviewing court fails to find sufficient evidence to support the conviction on another count.

The Court's authoritative guidance on this question is vital because, under the Rules of the Supreme Court of the United States, rule 10, the *Mitchell* opinion creates a conflict among the Courts of Appeals, as to the effect that a "not true" finding on an allegation has on a conviction on another count. Additionally, the holding in *Mitchell* conflicts with a decision of the California Supreme Court which held that when a defendant is found guilty of murder, but the weapon enhancement allegation is found to be "not true," the jury may have had a reasonable doubt that the defendant was involved as the direct perpetrator, or as an aider and abetter, but the jury had no such doubt that he was one or the other. *People v. Santamaria*, 8 Cal. 4th 903, 919, 884 P. 2d 81, 35 Cal. Rptr. 2d 624 (1994)

Further, the *Mitchell* opinion is contrary to this Court's holdings in *United States v. Watts*, 117 S. Ct. 633, 637 (1997), that an acquittal is not a finding of any fact, and is also contrary to the holding in *United States v. Powell*, 469 U.S. 57, 65 (1984), that the court must review all the evidence independently of the jury's determination that evidence on another count was insufficient when determining whether sufficient evidence supports the conviction.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION, AS TO THE EFFECT THAT "NOT TRUE" JURY FINDINGS HAVE ON THE CONVICTED COUNTS, HAS CREATED A CONFLICT AMONG THE CIRCUITS AND IS CONTRARY TO CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT

Traditionally,

> an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual findings inferences . . .

United States v. Watts, 117 S. Ct. at 637. With a not guilty verdict, the court only knows the verdict, not what the jury factually found. *United States v. Acosta*, 17 F.3d 538, 546 (2d Cir. 1994). In fact,

> a not guilty verdict on one count does not establish any facts favorable to the defense for the purpose of determining the sufficiency of the evidence on the counts of conviction.

United States v. Parks, 68 F.3d 860, 865 (5th Cir. 1995) (quoting *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994)). A judgment of acquittal is not admissible to rebut inferences drawn from other evidence because an acquittal does not prove innocence, only that the

prosecution failed to meet its burden of proof. *United States v. Lahey*, 55 F.3d 1289, 1296 (7th Cir. 1995); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992).[5] Even if an acquittal on one count is inconsistent with a guilty verdict on another count, a defendant is not entitled to a reversal of his conviction because an inconsistent verdict may be the result of "mistake, compromise, or lenity" on the part of the jury. *United States v. Powell*, 469 U.S. 57, 65 (1984); *Dunn v. United States*, 284 U.S. 390, 393-94 (1932).

In spite of seemingly established precedent, the Ninth Circuit in *Mitchell* held that the jury's "not true" findings were "special findings" which were "dispositive of the questions put to the jury," namely that Mitchell did not personally use a firearm, or personally drive the car over the victim. *Mitchell v. Prunty*, 107 F.3d at 1139 n.2.[6] The court's holding is contrary to the holdings in *United States v. Watts*, *United States v. Powell*, *United States v. Acosta*, *United States v. Parks*, *United States v. Nguyen*, *United States v. Lahey*, and *Prince v. Lockhart*.

Additionally, this Court and several other courts of appeals have held that courts should not attempt to probe or speculate on the thoughts or motives for a jury's verdict, nor should the courts attempt to rationalize or reconcile verdicts. *See United States v. Powell*, 469 U.S. at 66-67; *Dunn v. United States*, 284 U.S. at 393-94; *United*

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5. Indeed, the very same evidence is admissible at a subsequent trial governed by a lower standard of proof. For instance, an acquittal in a murder trial would not bar the same evidence in a subsequent civil suit for wrongful death. *See also United States v. Watts*, 117 S. Ct. at 637.

6. The Ninth Circuit has found acquittal verdicts to be findings of ultimate facts in other cases, which involved collateral estoppel issues on retrial. *See United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997); *Santamaria v. Horsley*, 110 F.3d 1352 (9th Cir. 1997); *United States v. Seley*, 975 F.3d 717 (9th Cir. 1992).

66-67; *Dunn v. United States*, 284 U.S. at 393-94; *United States v. Clemmer*, 918 F.2d 570, 573 (6th Cir. 1990); *United States v. Messerlian*, 832 F.2d 778, 797 (3d Cir. 1987). However, the Ninth Circuit in *Mitchell* attempted to reconcile the jury's verdicts of acquittal on the personal involvement allegations with the murder conviction and found that the only theory on which the jury could have reached consistent verdicts was that Mitchell, at most, aided and abetted in the murder. The Ninth Circuit's probing into the jury's verdicts was contrary to well established federal law, and caused the court to reach a conclusion which is expressly contrary to California law and the law in other federal circuits.

In *People v. Santamaria*, 8 Cal. 4th 903, 884 P. 2d 81, 35 Cal. Rptr. 2d 624 (1994), the California Supreme Court held that as long as each juror is convinced beyond a reasonable doubt that a defendant is guilty of murder, the jury need not decide unanimously by which theory he is guilty. *Id.* at 918. The court further held that if the jury has a reasonable doubt that the defendant specifically used a weapon, and still finds the defendant guilty of murder, the jury may have had a reasonable doubt that the defendant was involved as the direct perpetrator, or as an aider and abetter, but the jury had no such doubt that he was one or the other. *Id.* at 919.

The Ninth Circuit's opinion, in this case, needlessly speculated as to the jury's theory of guilt, and led the court to disregard California's law, and the evidence which supported the murder verdict. Once the Ninth Circuit mischaracterized the jury's "not true" findings as dispositive to those facts, its refusal to consider the evidence underlying the allegations involved was the equivalent of a refusal to consider the facts underlying counts in which a defendant has been acquitted in determining whether their was sufficient evidence to support guilty findings on other counts. This is clearly contrary to this Court's holding in *United States v. Powell*,

469 U.S. at 67. *Powell* held a review of the sufficiency of the evidence on one count "should be independent of the jury's determination that evidence on another count was insufficient." *See also United States v. Long*, 952 F.2d 1520, 1525 (8th Cir. 1991); *United States v. Alanis*, 945 F.2d 1032, 1035 (8th Cir. 1991). Indeed, "[e]ach count in an indictment is regarded as if it was a separate indictment." *Dunn v. United States*, 284 U.S. at 393; *see also United States v. Clemmer*, 918 F.2d at 573.

In sum, the Ninth Circuit's opinion on the effect that "not true" findings have on other convicted counts, conflicts with decisions by the Second, Fifth, Seventh, and Eighth Circuits, and has led to a widely disparate consideration of evidence, on review of claims of insufficient evidence. Additionally, the Ninth Circuit's interpretation of "not true" findings allows the court to disregard evidence of guilt, which is contrary to this Court's holding in *United States v. Powell*, 469 U.S. at 67, which states that sufficiency-of-evidence review involves an assessment of all the evidence to determine whether any rational trier of fact could find a defendant guilty beyond a reasonable doubt in accordance with *Jackson v Virginia*, 443 U.S. 307, 316, 319 (1979).

II.

THE NINTH CIRCUIT'S RULE THAT "NOT TRUE" JURY FINDINGS CONSTITUTE ULTIMATE FINDINGS OF FACT IS A "NEW" RULE WITHIN THE MEANING OF *TEAGUE V. LANE*

As discussed above, established California and federal precedent have held that an acquittal is not a finding of any fact, and the court must review all the evidence, even evidence underlying acquitted counts, in determining whether sufficient evidence supports a conviction. The Ninth Circuit has created a new rule, that "not true" jury findings constitute dispositive findings of fact that may rebut other evidence on appeal, and therefore, *Mitchell* cannot benefit from the court's holding. *See Teague v. Lane*, 489 U.S. 288, 305-310 (1989). The Ninth Circuit's new rule imposes a new obligation on the state which was not dictated in light of *United States v. Powell*, at the time Mitchell's conviction became final. *See O'Dell v. Netherland*, No. 96-6867 97 U.S. LEXIS 3862 at *10 (U.S. June 19, 1997). Neither of the two *Teague* exceptions apply.

Indeed, the prosecution would have been much more circumspect had existing precedent allowed a murder conviction to be reversed on the basis that allegations, commensurate with a defendant's culpability, yet not proven beyond a reasonable doubt would limit the evidence to be considered in support of the murder verdict. In the instant case, the Ninth Circuit's refusal to review all of the evidence was not dictated by *United States v. Powell* and *Jackson v. Virginia*, and therefore, created a new rule. Accordingly, Mitchell is not entitled to habeas relief from the Ninth Circuit's new rule.

CONCLUSION

Accordingly, for the foregoing reasons, the Warden respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, in the case at bar.

Dated: July 7, 1997.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY ISAIAH MITCHELL, *Petitioner-Appellant,* v. K. W. PRUNTY, Chief Deputy Warden, *Respondent-Appellee.*	No. 94-55990 D.C. No. CV-93-05796-RG(GHK) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
June 12, 1996—San Francisco, California

Filed February 26, 1997
Amended April 10, 1997

Before: Alfred T. Goodwin, Harry Pregerson and
Alex Kozinski, Circuit Judges.

Opinion by Judge Kozinski; Dissent by Judge Pregerson

SUMMARY

Criminal Law and Procedure/Criminal Acts

The court of appeals reversed a judgment of the district court. The court held that evidence of the defendant's gang membership and presence at the scene of a crime alone is insufficient to support a conviction for aiding and abetting a gang-related murder.

On July 11, 1989, four members of the Four Tray Hoover Crips gang stood on the street below the landing of appellant Troy Mitchell's second floor apartment. Mitchell was a member of a rival gang, the Rolling Forties. When Mitchell yelled "Fuck Hoover" from the landing, the four Hoover gang members ran up the staircase to Mitchell's apartment, kicking in the door. After a fistfight between gang members, the Hoovers returned to the street. Mitchell drove by with fellow Rolling Forty members; the group opened fire on the Hoovers.

Jerry Knox was hit by a bullet in the arm and retreated to his aunt's nearby home. Knox's girlfriend intended to drive him to the hospital. En route, Knox asked her to stop in front of Mitchell's apartment building. There, Knox yelled angrily at the group of men on the landing; one of them held a gun in plain sight. Knox received two non-lethal gunshot wounds in the neck and in the leg. Knox's girlfriend drove off in fear, leaving him in the street. After shooting Knox, some of the men on the landing fled into two cars. One of the cars drove over Knox's body, fatally crushing his chest.

Mitchell was convicted of second-degree murder. The verdict form also contained two special jury findings: (1) that Mitchell had not personally used a firearm and (2) that he had not been driving the car that ran over Knox.

Mitchell filed a federal habeas petition. The district court dismissed the petition on its merits and denied Mitchell's request for a certificate of probable cause. The court of appeals granted his request for a certificate of probable cause.

[1] Because the jury found that Mitchell neither fired any of the bullets that struck Knox nor drove the vehicle that crushed his chest, Mitchell could have been found guilty of Knox's murder only as an aider and abettor. In California, a person is guilty of aiding and abetting if he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging or facili-

tating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. To be convicted, an aider and abettor must have criminal intent which was formed *prior to or during* the commission of the offense.

[2] Instructing the jury on the meaning of "to aid and abet," the trial court stated that if the jury found that Mitchell had allowed firearms into his apartment with the criminal intent that defines first or second-degree murder, they could convict Mitchell for Knox's murder. [3] The jury instruction was correct. However, because Mitchell could not have known that Knox would appear outside his apartment, there was no way Mitchell could have admitted armed fellow gang members into his apartment with the intent to commit murder. Evidence that Mitchell may have had a motive for murder was not proof of intent.

[4] Because being crushed by a car was the actual cause of Knox's death, Mitchell could have been found guilty of aiding and abetting if there had been proof that he instigated, encouraged or assisted the driver in crushing Knox. There was no such evidence.

[5] There was no proof that the vehicle that killed Knox was owned or provided by Mitchell for the purposes of crushing Knox, or that Mitchell said anything to the driver in the minutes between the shooting and the running over of Knox. There was nothing in the record to suggest that Mitchell aided and abetted Knox's killing.

[6] Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, promotion, encouragement or instigation needed to establish aiding and abetting. [7] Forsaking gang membership as a basis for liability, the state could not rely on Mitchell's presence at the time of the shooting or in the assaulting car to establish his liability.

[8] Because there was no evidence from which a rational jury could have inferred that Mitchell aided and abetted Knox's murder, remand for the issuance of a writ of habeas corpus was required.

In his dissent, Judge Pregerson wrote that the circumstantial evidence, viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that Mitchell intentionally aided and abetted the murder of Knox.

COUNSEL

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Alene M. Games, Deputy Attorney General, Los Angeles, California, for respondent-appellee Chief Deputy Warden K. W. Prunty.

ORDER

The opinion is amended by adding the following to the end of footnote 2 (slip op. at 1947):

> In its petition for rehearing, the state for the first time urges us to ignore these findings in determining whether the evidence presented at trial was sufficient to convict. It states: "[I]t is . . . possible the jury was convinced of petitioner's guilt as a direct perpetrator . . . even though they did not find petitioner personally used a firearm, and found he was not the driver of the car." Petition for Rehearing at 7. After all, the government explains, "seemingly inconsistent verdicts do not indicate the prosecutor failed to prove all the essential elements of the offense." *Id.*

In support of its argument, the state points to *United States* v. *Powell*, 469 U.S. 57 (1984); *United States* v. *Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 961 (1997); and *United States* v. *McKinney*, 88 F.3d 551 (8th Cir. 1996). But these cases stand for an altogether different proposition: that in reviewing the sufficiency of the evidence on one count, acquittals on other, related counts, are not conclusive. *See Powell*, 469 U.S. at 67 ("Sufficiency-of-the-evidence review . . . should be independent of the jury's determination that evidence on another count was insufficient."); *Shenberg*, 89 F.3d at 1470 ("[N]either the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions."); *McKinney*, 88 F.3d at 555 ("Appellate review of a conviction on one count . . . takes place independent of the jury's determination that evidence on another count was insufficient." (internal quotation omitted)). This is true as a simple logical matter; an acquittal is not proof of *any* predicate fact.

Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights.

With this amendment, the panel votes to deny the petition for rehearing. Judge Pregerson would grant the petition.

No judge having called for a vote on the suggestion for rehearing en banc, the suggestion is rejected.

OPINION

KOZINSKI, Circuit Judge.

The question at the heart of this state habeas case is whether there was sufficient evidence to convict petitioner of aiding and abetting a gang-related murder.

I

The evening of July 11, 1989, started out uneventfully for members of the Four Tray Hoover Crips gang and their rivals, the Rolling Forties. Between six and seven p.m. Maurice Taylor, Jerry "Judabean" Knox, "Eight-Ball" and "Big Black," all of them Four Tray Hoovers, were hanging out on the corner of 43rd and Kansas Streets in the city of Los Angeles. Things quickly turned ugly, however, when petitioner Troy Isaiah Mitchell, standing on the nearby second-floor landing of his apartment building, yelled out "Fuck Hoover."[1]

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[1]Like Justice Robert Gardner, we deplore the continuing decline in the style and finesse of our public discourse:

> It is a sad commentary on contemporary culture to compare "Don't say a word, don't say a mother-fucking word" with "Stand and deliver," the famous salutation of Dick Turpin and other early English highwaymen. It is true that both salutations lead to robbery. However, there is a certain rich style to "Stand and deliver." On the other hand, "Don't say a word, don't say a mother-fucking word" conveys only dismal vulgarity.
>
> The speech of the contemporary criminal culture has always been a rich source of color and vitality to any language. Yet, when one compares the "bawds," "strumpets," "trulls," "cutpurses," "knaves," and "rascals" of Fielding and Smollett to the "hookers," "pimps," "Narcs," "junkies," and "snitches" of today's criminal argot, one wonders just which direction we are traveling civilization's ladder. "Hooker," at least, has traceable historical antecedents — although the descendants of General "Fighting Joe" Hooker would probably prefer that their famous ancestor be remembered for something other than his army's camp followers — such as the slaughter at Chancellorsville."

People v. *Benton*, 77 Cal. App. 3d 322, 324 n.1 (1978).

Taking extreme umbrage, Judabean and his cohorts ran up the staircase from the street to the second-floor landing and kicked in the door to Mitchell's apartment. After a fistfight between gang members, the Hoovers returned to their perch on the street corner. A few minutes later, Mitchell drove by with fellow Rolling Forty members; the group opened fire on the Hoovers. Big Black was shot in the ankle and Judabean in the arm. The former was taken to the hospital while the latter retreated to his aunt's nearby home.

Kimberly Johnston, Judabean's girlfriend, learned of the shooting and immediately came to his aid. She intended to drive him to the hospital, she testified, but they never got there. En route, Judabean asked Johnston to stop in front of petitioner's apartment building, the scene of the earlier altercation. There, a group of men stood on the second-floor landing; one of them held a long-barreled gun in plain sight. Judabean rolled down the car window and yelled in an angry voice, "I wish you would shoot me." He then got out of the car and repeated his challenge.

This turned out to be a bad idea. When the shooting stopped, Judabean was lying on the ground. One bullet had passed through his neck and lodged in his spine; another had passed through his right leg. Johnston drove off in fear, leaving Judabean in the street.

After the second shooting, those on the landing fled. Some ran down the street; others piled into two cars. While speeding away, one car made a U-turn and trampled Judabean's body, crushing his chest. There was testimony that Mitchell was the driver of that car. Mitchell himself told police he was the driver; he later denied driving but seemed to concede he had been in the car.

At trial, Dr. Christopher Rogers, a Deputy Medical Examiner, testified that Judabean's three gunshot wounds — one in the arm, another in the right leg and the last in the neck —

would have been treatable. He further testified that, but for the blunt force compression of the chest, Judabean would probably have survived with ordinary medical care. Dr. Rogers concluded that the chest injury was "rapidly fatal" and would have caused death within one or two minutes, even if it had been Judabean's only injury.

II

Mitchell alone was charged with Judabean's killing; a jury found him guilty of second degree murder. The verdict form also contained two special jury findings: (1) that Mitchell had not committed the crime by personal use of a firearm; and (2) that he had not committed the crime by driving the vehicle that ran over Judabean.[2]

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[2]The verdict read:

> We, the jury in the above-entitled action, find the defendant, Troy Isaiah Mitchell, not guilty of the crime of murder in the first degree, a felony, as charged in count one of the information.
>
> We, the jury in the above entitled action, find the defendant, Troy Isaiah Mitchell, guilty of the crime of murder in the second degree, a lesser but necessarily included offense to that charged in count one of the information.
>
> We further find that . . . the allegation that in the commission and attempted commission of above offense the said defendant, Troy Isaiah Mitchell, personally used a firearm within the meaning of Penal Code Section[s] 1203.06(a)(1) and 12022.5 to be not true.
>
> We further find the defendant, Troy Isaiah Mitchell, was not the driver of the car which drove over Jerry Knox.

RT 637.

In its petition for rehearing, the state for the first time urges us to ignore these findings in determining whether the evidence presented at trial was sufficient to convict. It states: "[I]t is . . . possible the jury was convinced of petitioner's guilt as a direct perpetrator . . . even though they did not find petitioner personally used a firearm, and found he was not the driver of the car." Petition for Rehearing at 7. After all, the government explains, "seemingly inconsistent verdicts do not indicate the prosecutor failed to prove all the essential elements of the offense." *Id.*

After unsuccessfully pursuing state court remedies, Mitchell filed a federal habeas petition pursuant to 28 U.S.C. § 2254.[3]

In support of its argument, the state points to *United States* v. *Powell*, 469 U.S. 57 (1984); *United States* v. *Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 961 (1997); and *United States* v. *McKinney*, 88 F.3d 551 (8th Cir. 1996). But these cases stand for an altogether different proposition: that in reviewing the sufficiency of the evidence on one count, acquittals on other, related counts, are not conclusive. *See Powell*, 469 U.S. at 67 ("Sufficiency-of-the-evidence review . . . should be independent of the jury's determination that evidence on another count was insufficient."); *Shenberg*, 89 F.3d at 1470 ("[N]either the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions."); *McKinney*, 88 F.3d at 555 ("Appellate review of a conviction on one count . . . takes place independent of the jury's determination that evidence on another count was insufficient." (internal quotation omitted)). This is true as a simple logical matter; an acquittal is not proof of *any* predicate fact.

Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights.

[3]The state argues that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed into law on April 24, 1996, bars consideration of Mitchell's petition. However, we have held that the statute is not to be applied to cases pending at the time it was enacted. Order, *Jeffries* v. *Wood*, No. 95-99003 (9th Cir., Dec. 20, 1996) ("We hold that the amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do not apply to cases filed in federal courts of this Circuit prior to the Act's effective date of April 24, 1996.").

In any event, the Act does not prevent review where the state court's resolution of petitioner's claim amounts to "an unreasonable application of . . . clearly established Federal Law." 28 U.S.C. § 2254(d)(1). Here, the relevant federal law is clearly established; sufficiency of the evidence is evaluated under the standard set forth in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Under *Jackson*, the court must ask, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original).

The district court, adopting the findings, conclusions and recommendations of the magistrate judge, dismissed the petition on the merits and denied a Certificate of Probable Cause.[4] We granted Mitchell's request for a Certificate of Probable Cause.[5]

[1] Mitchell argues that there was insufficient evidence to sustain his murder conviction.[6] We review Mitchell's petition

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Was the state court's application of *Jackson* to the facts of this case reasonable? While the contours of the "unreasonable application" standard are still being debated, *compare Lindh* v. *Murphy*, 96 F.3d 856, 870-71 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 726 (Jan. 10, 1997), *with Drinkard* v. *Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), one factor we must consider in determining whether a state court's application of established law was reasonable is the importance of the issue on review. Because "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence," *Jackson*, 443 U.S. at 323, state courts must take more than a perfunctory look at the relationship between the evidence presented and the verdict.

Here, the California Court of Appeal, devoting just over one page to Mitchell's sufficiency claim, failed to do the issue justice. Much of the discussion focuses on a neighbor's testimony that Mitchell "got into the car [and] started the car very quickly and . . . made a turn . . . and ran . . . over [Judabean]." *People* v. *Mitchell*, No. B056366, at 6 (Cal. Ct. App. filed Nov. 25, 1992). But this testimony was mooted by the jury's finding that Mitchell was not driving the car. See note 2 *supra*. It is not reasonable to affirm a conviction based on testimony that is clearly rejected by the verdict. The court also relied on the statement of Maurice Taylor that Mitchell shot Judabean in the arm; the testimony of Judabean's girlfriend that a group of people on the balcony near Mitchell's apartment shot Judabean; and "the physical evidence of 17 shell casings found on [the] staircase of [Mitchell's] apartment." *Id.* at 6-7. However, the jury found that Mitchell was not a trigger man and, for the reasons explained below, the other facts cited do not come close to proving aiding and abetting. This analysis is also not a reasonable application of *Jackson*.

[4]*Mitchell* v. *Prunty*, No. CV 93-5796-RG(GHK) (C.D. Cal. filed May 4, 1994).

[5]*Mitchell* v. *Prunty*, No. 94-55990 (9th Cir. Aug. 29, 1994) (order granting certificate of probable cause).

[6]Mitchell also argues that he was deprived of due process when the jury was improperly instructed as to each element of aiding and abetting. Because we vacate the conviction based on insufficiency of the evidence, we do not reach this claim.

de novo. *Calderon* v. *Prunty*, 59 F.3d 1005, 1008 (9th Cir. 1995). Because the jury found that Mitchell neither fired any of the bullets that struck Judabean nor drove the vehicle that crushed Judabean's chest, he could be guilty of Judabean's murder — if at all — only as an aider and abettor. In California, a person is guilty of aiding and abetting if "he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People* v. *Beeman*, 35 Cal. 3d 547, 561 (1984). To be convicted, an aider and abettor must have criminal intent, and "the requisite intent to render such aid must be formed *prior to or during* 'commission' of that offense." *People* v. *Cooper*, 53 Cal. 3d 1158, 1164 (1991) (emphasis in original).

Since the jury did not disclose *how* it thought Mitchell aided and abetted Judabean's murder, we must consider petitioner's involvement in the gang-related activities the night Judabean was killed.

A. The Shootings

[2] Judabean was shot on two separate occasions. The state does not contend that the first shooting caused a lethal injury. The state does take great pains to connect Mitchell to the second shooting; it argues that, even though Mitchell was found not to have fired any of the shots from the balcony, he intentionally promoted the shooting by his fellow gang members. During deliberations, the jury seemed to focus on the possibility that Mitchell aided and abetted by admitting armed gang members onto the landing of his apartment building. It asked the trial judge for

> [f]urther instruction on the meaning of "to aid and abet." Specifically, is the defendant aiding and abetting in the commission of a crime (murder) or the

> natural consequence (murder) if he allows or facilitates or promotes the introduction of deadly firearms into his home.

ER at 131. The court responded:

> If you find that the defendant let or allowed firearms into his apartment with the intent and mental state as defines murder of the first or second degree, then the answer to your question is yes, which means that if you find that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first- or second-degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no.

ER at 140-41.[7]

[3] The jury instruction is correct; on this record, it also leads to only one possible answer: Because Mitchell could not have known that Judabean would appear outside his apartment — deferring medical care in order to taunt his adversaries — there is no way Mitchell could have admitted fellow gang members into his apartment with the intent to commit murder. Thus, even if Mitchell facilitated Judabean's murder by making the landing of his apartment building available to the assailants,[8] this actus reus was not coupled with the neces-

[7]The court then referred the jury to its original instructions on aiding and abetting. After more than three days of deliberation, the jury came back with a verdict within ninety minutes of receiving this instruction.

[8]This, too, is doubtful because the undisputed evidence is that Judabean did not die from any of the gunshot wounds. The state's own proof shows that all of Judabean's bullet wounds were treatable, and that he would easily have survived with ordinary medical care. The Deputy Medical Examiner did testify that, had Judabean's injuries been left untreated, he would

sary *simultaneous* mens rea.[9] Evidence that Mitchell may have died of infections or other complications in a matter of days or weeks. But this is true of many wounds. An injury that *could* be fatal under highly unusual circumstances cannot be said to have caused the death of a victim who suffered a second, far more traumatic injury, which alone would have caused death in a matter of minutes.

To convict appellant of murder because he inflicted a wound that *could* have been fatal subverts the general rule that causation is interrupted by an unforeseeable event. Professor Focht described a case in which "the defendant wounded the deceased and the latter died of scarlet fever contracted from the physician who treated the wound. It was held that proximate causation was lacking, because the disease, while the *de facto* result of the wound, was unforeseeable." James L. Focht, Jr., *Proximate Cause in the Law of Homicide — With Special Reference to California Cases*, 12 S. Cal. L. Rev. 19, 31-32 (1938)(citing *Bush* v. *Commonwealth*, 78 Ky. 268 (1880)). The failure to properly treat a serious but nonfatal wound is at least as unforeseeable in the 1990s as was the transmission of scarlet fever in the 1880s.

Put another way, if "gross maltreatment of the wound was the sole cause of death, the person inflicting the wound will not be liable . . ., because the wound was not the proximate cause of death." Focht, 12 S. Cal. L. Rev. at 34. In this case, "gross maltreatment" would have been required to render Judabean's gunshot wounds fatal.

[9]Although second degree murder does not involve premeditation, aiding and abetting second degree murder does require intent to facilitate a criminal act. That act may be a lesser crime than second degree murder because, "Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime . . . but also for any other offense . . . committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." *People* v. *Prettyman*, No. S040008, 1996 Cal. LEXIS 6520 (Dec. 9, 1996); *see also People* v. *Montano*, 96 Cal. App. 3d 221, 226 (1979)(where a defendant knowingly and intentionally aids a criminal act, he is liable for all crimes that are a natural and probable consequence of that act).

However, as discussed above, there is no evidence that Mitchell intentionally aided and abetted second degree murder or any other crime (such as assault) of which second degree murder was a natural and probable result.

have wanted Judabean dead — that is to say, that he had a motive for murder — is not proof of intent.[10]

B. The Car Assault

[4] The jury might have rested its verdict on Mitchell's participation in running Judabean over with the car. Because this was the actual cause of Judabean's death, Mitchell could have been found guilty of aiding and abetting if there were proof that he instigated, encouraged or assisted the driver in crushing Judabean with the car. *See Beeman*, 35 Cal. 3d at 561. But there is no such evidence. One witness testified that Mitchell drove the car that ran over Judabean but the jury rejected this theory in its special finding: "We further find the defendant, Troy Isaiah Mitchell, was not the driver of the car which drove over Jerry Knox."

[5] As to what else Mitchell might have done to abet the running over of Judabean, the record is silent. There is no proof that the vehicle that killed Judabean was owned or provided by Mitchell for the purpose of doing the running over; there is no proof that Mitchell said anything to the driver of the vehicle in the minutes between the shooting and the fatal U-turn; in short, there is nothing at all to suggest that Mitchell helped bring about Judabean's death, except perhaps by adding weight to the car that ran over Judabean's body. There is, in other words, a massive failure of proof that Mitchell aided and abetted Judabean's killing.

The state tries hard to bridge the gap in its evidence by arguing that Mitchell aided and abetted the killing by fanning the fires of gang warfare that culminated in Judabean's death.

[10]Mitchell might also have been guilty as an aider and abettor had he formed the requisite intent, and begun assisting the assailants, before the gunfight had ended. *Cf. People* v. *Montoya*, 7 Cal. 4th 1027, 1048 (1994). However, the record contains no evidence that he rendered any assistance other than letting the assailants into his apartment building.

It offers this recitation of facts that, in its view, support the jury's inference of guilt:

> [T]he other princip[als] were appellant's fellow gang members. . . . [A]ppellant knew additional crimes would be committed because appellant seemed determine[d] to fuel escalating hostilities. Additionally, [appellant stated that] he got into a . . . car . . . which ran over Judabean's body . . . . [Appellant] fled with his fellow gang members, and remained with them throughout the evening, without ever trying to distance himself from the gang or the crime.

Appellee's Supplemental Br. at 21-22.

[6] The state's argument smacks of guilt by association. Except in *West Side Story*, gang members do not move in lock-step formation. Gang movements are, in fact, often more chaotic than concerted. *See* Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 Wake Forest L. Rev. 943, 949-50 (1993)(describing most gangs as "disorganized" and decrying "efforts to prosecute . . . gang members on the basis of social ties," as opposed to "traditional legal principles," as a "panic response"). Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. To hold otherwise would invite absurd results. Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the "common purpose of 'fighting the enemy.' " *Curtin* v. *Lataille*, 527 A.2d 1130, 1133 (R.I. 1987).[11]

[11]Indeed, accepting the state's argument, we fail to see why any other member of defendant's gang could not be held criminally liable for Judabean's death, since they all "remained with [each other] throughout the evening, without ever trying to distance [themselves] from the gang or the crime."

[7] Forsaking gang membership as a basis for liability, the state cannot rely on Mitchell's presence at the time of the shooting, or in the assaulting car, to establish liability. That Mitchell may be a thoroughly evil person does not, under California law, make him a murderer.[12]

* * *

[8] Because there is no evidence from which a rational jury could have inferred that Mitchell aided and abetted Jerry Knox's murder, we REVERSE the district court's denial of the petition for a writ of habeas corpus and REMAND for issuance of the writ.

PREGERSON, Circuit Judge, dissenting:

We are required to "consider[ ] the evidence in a light most favorable to the prosecution and defer[ ] to the trier of fact's presumed resolution of conflicting inferences most favorably to the prosecution." *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Viewed in this light, the evidence in this case could allow a rational trier of fact to find that Mitchell aided and abetted in the murder of Knox.

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[12]The weakness of the government's case is illustrated by this passage from its brief:

> It was undisputed at trial that Judabean had engaged in a number of fights at appellant's apartment on the day of the shooting. Nor was it disputed that appellant and Judabean belonged to rival gangs. Finally, the evidence was uncontradicted Judabean had been shot, driven over by a car, and he died from those wounds. Appellant's sole defense was he was not the perpetrator of the murder nor did he aid and abet in the murder.

Appellee's Br. at 10.

This "sole defense" also happens to be a claim of innocence.

THE SHOOTING

The first juncture at which Mitchell could have aided and abetted Knox's murder was when the shooters on Mitchell's landing fired at Knox.

In a special verdict, the jury found that Mitchell himself did not fire at Knox. Moreover, mere participation in a gang that is involved in a homicide is an insufficient basis from which to infer a particular gang member's intent to commit the homicide. But here, the record contains other evidence to support a conclusion that Mitchell intentionally aided and abetted the shooting of Knox by permitting heavily-armed fellow gang members to gather just outside Mitchell's apartment before the midnight shooting.

First, the record contains facts that could support an inference that killing Knox was a personal priority for Mitchell. Mitchell had a motive to kill Knox because Knox had broken into Mitchell's apartment earlier that evening. Some evidence also indicated that Mitchell and Knox had gotten into a fist-fight during Knox's break-in and that Mitchell had wounded Knox in a drive-by shooting soon after the fight.

Second, the record indicates that Mitchell's apartment served as headquarters for the day's activities leading up to Knox's murder. In particular, the record indicates that Mitchell's gang gathered at his apartment and was heavily-armed when Knox arrived later that night.

Given these facts, a reasonable jury could have concluded that Mitchell intended to aid and abet his fellow gang members in killing Knox if the opportunity presented itself. This circumstantial evidence and the logical inferences drawn from it are sufficient to sustain Mitchell's conviction. *See Payne*, 982 F.2d at 341 (denying habeas relief to petitioner convicted of intentionally aiding first-degree murder because "[c]ircumstantial evidence and inferences drawn from it may

be sufficient to sustain a conviction") (quoting *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986)).

THE ASSAULT WITH THE CAR

The second juncture at which the jury could have found that Mitchell aided and abetted Knox's murder was when Mitchell joined his fellow gang members in a car which, according to some testimony, was the car that drove over Knox's injured body and crushed his chest.

In its special verdict, the jury found that Mitchell was not the driver of that car. The special verdict did not determine, however, that Mitchell played no role in this assault. As noted above, there is evidence that could support the inference that Mitchell wanted to kill Knox. There is also some evidence that Mitchell was in the car that ran over Knox. A rational jury could infer from this evidence of Mitchell's presence in the car and his animus toward Knox that Mitchell encouraged the driver of the car to make a sudden U-turn and run over Knox. Thus, the evidence in the record could support a conclusion that Mitchell intentionally aided and abetted Knox's murder by encouraging the assault with the car. *See Payne*, 982 F.2d at 341 (upholding a conviction where "[a] rational trier of fact could prefer the incriminating explanation for [petitioner's] conduct over explanations which would be inconsistent with an intent to aid in the killing").

JURY INSTRUCTIONS

Mitchell also argues that he was denied due process because the trial court failed to instruct the jury as to intent, an essential element of the offense of aiding and abetting second-degree murder. Because Mitchell did not object to the jury instructions at the time of trial, the instructions are reviewed for plain error. *United States v. English*, 92 F.3d 909, 914 (9th Cir. 1996).

Contrary to Mitchell's contention, the record shows that the trial court properly instructed the jury on the element of intent. The trial court issued standard jury instructions taken from California Jury Instructions (Criminal) ("CALJIC") 3.01. CALJIC 3.01, as submitted to the jury, explicitly sets forth intent as an element of aiding and abetting second-degree murder:

> A person aids and abets the commission of a crime when he or she, (1) with knowledge of the unlawful purpose of the perpetrator and (2) *with the intent or purpose of committing, encouraging, or facilitating the commission of the crime,* by act or advice aids, promotes, encourages or instigates the commission of the crime.

CALJIC 3.01 (emphasis added).

The jury later requested further instruction on the meaning of "to aid and abet." The jury asked: "Specifically, is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequence (murder) if he allows and/or facilitates and/or promotes the introduction of deadly firearms into his home?"

The trial court responded with a supplemental instruction which clearly reiterated the element of intent:

> [I]f you found that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first- or second-degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no.

Because the trial court clearly indicated intent as an element of the offense in both the original and supplemental jury instructions, there was no plain error.

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Because the trial court clearly indicated intent as an element of the offense in both the original and supplemental jury instructions, there was no plain error.

CONCLUSION

The standard of review in this case does not permit us to grant habeas relief solely because we are unsure whether the petitioner intentionally aided and abetted in the killing. "We are required to deny the writ, even if we ourselves might not be persuaded beyond a reasonable doubt, if *any* rational trier of fact could have been so persuaded . . . ." *Payne*, 982 F.2d at 339. I think the circumstantial evidence in this case is sufficient to permit a rational jury to find that Mitchell intentionally aided and abetted in Knox's killing. Accordingly, I would affirm.

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FILED: MAY 5, 1995

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner,* vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent.*	)	No. CV 93 5796 RG(GHK) JUDGMENT

Pursuant to the Order of the court adopting findings conclusions, and recommendations of the United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed on the merits.

DATED: This 2 day of May, 1994.

"/Richard A. Gadbois
RICHARD A. GADBOIS, JR.
United States District Judge

FILED: MAY 4, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner*, vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent*.	) Case No.) CV 93 5796 RG(GHK))) ORDER ADOPTING) FINDINGS,) CONCLUSIONS, AND) RECOMMEN-) DATIONS) OF UNITED STATES) MAGISTRATE) JUDGE

Pursuant to 28 U.S.C. § 636, the court has reviewed the petition, all of the records and files herein, and the attached Report and Recommendation of the United States Magistrate Judge. The court, having conducted a de novo review of the Magistrate Judge's Report and Recommendation to which Objections were interposed, approves and adopts the Magistrate Judge's findings, conclusions, and recommendations.

IT IS HEREBY ORDERED that this action is dismissed on the merits.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, together with the Magistrate Judge's Report and Recommendation, and the Judgment herein, by United States mail, on petitioner and on the Attorney General for the State of California.

DATED: This 2 day of May, 1994.

"/Richard A. Gadbois
RICHARD A. GADBOIS, JR.
United States District Judge

FILED: APRIL 4, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner,* vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent.*	) Case No.) CV 93 5796 RG(GHK))) REPORT AND) RECOMMENDATION) OF UNITED STATES) MAGISTRATE JUDGE))

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central district of California.

BACKGROUND

On September 24, 1993, petitioner, a state prisoner, filed this federal habeas petitioner challenging his second degree murder conviction. A return and a traverse have been filed.

PETITIONER'S CONTENTIONS

Petitioner contends that there was insufficient evidence to support the conviction and that the trial court erred in its instruction to the jury.

DISCUSSION

1. Insufficiency of Evidence

Petitioner was charged with the murder of Jerry "Judabean" Knox, with an allegation that he personally used a firearm during the commission of the crime. (C.T. at 81-82). The jury found petitioner guilty second degree murder but found that petitioner did not personally use a firearm, (C.T. at 207), and that he was not the driver of the car which drove over the victim's body after the shooting. (Id).

To determine whether there is sufficient evidence to support petitioner's conviction, the relevant inquiry is:

> "[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); see also Prantil v. State of California, 845 F.2d 314, 316 (9th Cir.), cert. denied, 488 U.S. 861, 109 S. Ct. 158, 129, L.Ed.2d 129 (1988). However, a reviewing court need not ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Jackson, 443 U.S. at 318-319.

The trial court gave the following instructions in relation to aiding and abetting:

"The persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly actively commit the act constituting the crime, or

2. Those who aid and abet the commission of the crime.

(C.T.at 156, citing CALJIC 3.00).

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, of facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(C.T. at 157, citing CALJIC 3.01).

> "One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crime charged in Count one was a natural and probable consequence of such originally contemplated crime.

(C.T. at 158, citing CALJIC 3.02).

Also, under California law, the natural and probable consequence doctrine states: "[A] defendant whose liability is predicated on his status as an aider and abettor need

not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." People v. Croy, 41 Cal.3d. 1, 12, n.5, 221 Cal.Rptr. 592, 710 P.2d 392 (1985).

Viewed in the light most favorable to the prosecution, the evidence showed: Maurice Taylor, Judabean (the victim), Eight-ball, and Big Black were standing at the corner of 43rd and Kansas. (R.T. at 39-40.) They all belonged to the Four Tray Hoover gang. (Id.). Petitioner, who was a member of the Rolling Forties Crips gang, yelled "Fuck Hoovers" in the direction of Judabean from his apartment building. (R.T. at 42-43, 51). Judabean and the others ran up the stairs to petitioner's apartment and a fist fight ensued between the Hoovers and the Rolling Forties. (R.T. at 43-44).

Judabean fought with petitioner. (R.T. at 52). After the fight, Judabean and the others went back to the street corner. (R.T. 45).

Petitioner then came downstairs, got into a car with several other Rolling Forties and drove to where Judabean was. (R.T. at 56-57). Someone yelled out "neighborhood Rolling Forty Crips" and petitioner leaned out and fired four shots, hitting Bib Black in the ankle and Judabean in the arm. (R.T. at 57- 58). Taylor and Eight Ball took Big Black to the hospital. Judabean went to his aunt's house and asked his girlfriend, Kimberly Johnson, to take him to the hospital. (R.T. at 102-03).

As they passed petitioner's apartment on their way to the hospital, Judabean told Kimberly to stop the car. (R.T. at 104). Kimberly saw five or more black males on the balcony of an apartment with a long black gun sticking out over the balcony. (R.T. at 105-106). After exiting the car, Judabean said, "I wish you would shoot me . . . I dare your to shoot me." (R.T. at 106-08).

The men on the balcony fired at Judabean, and he fell to the ground. The men also started shooting at the car, and Kimberly drove away. (R.T. at 108-09).

Another prosecution witness also testified that there were two black men on the balcony, joined later by eight to nine others when Kimberly's car arrived at the apartment and that petitioner was one of the shooters on the balcony. (R.T. at 140-44).

The above evidence supports a finding that petitioner is liable as an aider and abettor for second degree murder.[1] The Rolling Forties had earlier engaged in a fist fight with Judabean and had shot at him and his friends. Thus, it was reasonably foreseeable that they would shoot at them again if an opportunity arose.

The jury could have reasonably concluded on this evidence, viewed in the light most favorable to the

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1. Because the jury found petitioner did not use a firearm, and did not drive the car which ran over the victim's body, petitioner's liability must have been based on the theory of aiding and abetting.

prosecution, that petitioner permitted armed fellow gang members to be on his balcony with the intent of facilitating further shootings of rival gang members. Because it was reasonably foreseeable that the gang members could kill someone while committing an act the natural consequences of which were dangerous to human life, e.g., shoot at a person, petitioner is guilty as an aider and abettor of second degree murder. See People v. Croy, 41 Cal.3d at 12 n.5.

2. Jury Instruction

During deliberation, the jury posed the following question:

" . . . is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequence (murder) if he allows/or facilitates or promotes the introduction of deadly firearms into his home?" (Petition Exh. B at 7). The trial court answered as follows:

I read the question. I'm not going to answer that. I'm going to try to answer another question in the following manner. And I talked to the attorneys and this is what we're going to state:

If you find that the defendant let or allowed firearms into his apartment with the intent and mental state as defines murder of the first or second degree, then the answer to your question is yes, which means that if you found that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first- or second-degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no.

Now, I'm going to re-refer you to some instructions that you were given at the very beginning and you can reread those. Those might help key you into the areas insofar as this question goes. So if someone has a piece of paper and pencil, I am going to give you the numbers of the instructions and title on the particular instructions that you have. I'm almost positive in the upper left-hand corner of the instruction sheet these numbers refer to them.

The first one is 3.00. That defines principals. It defines what a principal is and what a principal isn't. The next is 3.01, which is the aiding-and-abetting definition. Next is 3.02, "principals - liability for natural and probable consequences." The next is 3.31. That's "concurrence of act and specific intent," and 3.31.5, which is "mental state."

> I don't want you to give any undue attention to the titles I gave the instructions. I want it to be neutral. I want you to refer to the right instructions, and hopefully this will assist you as to what the law is in this area, and hopefully this will allow you to reach a just and proper verdict based on the facts and the law. Okay. You can retire . . . . (Augmented R.T. at 13-15).

Petitioner contends that the trial court erred by instructing the jury to convict petitioner if they find that petitioner shared the intent to use the 'firearms in the crime of murder.

Petitioner is not entitled to habeas relief unless an alleged instructional error so infected the entire trial that the resulting conviction violates due process. Cupp v. Nauahten, 414 U.S. 141, 147, 94 S. Ct. 396, 3B L.Ed.2d 368 (1973). "To warrant habeas relief, the instruction cannot be merely undesirable, erroneous, or even 'universally condemned,' 'but must violate some due process right guaranteed by the Fourteenth Amendment.'" Prantil, 843 F.2d at 317, quoting Cupp v. Nauqhten, 414 U.S. at 146.

As discussed above, since an aider and abettor must aid or encourage the commission of a crime with the intent of committing or encouraging the commission of the crime, the trial court did not err in instructing the jurors to convict petitioner if they find that petitioner shared the intent to use the firearm to commit murder. This is especially true in light of the overall instructions the court gave to the jurors. See Prantil, 843 F.2d at 317 (court reviews alleged jury instruction errors "'in the context of the overall charge to the jury as a component of the entire trial process'")(Citation omitted).

CONCLUSION

The Magistrate Judge recommends that the District Judge issue an order (1) denying this petition for writ of habeas corpus, (2) dismissing this action on the merits, and (3) approving and adopting this Report and Recommendation.

Dated: This 4th day of April, 1994

"s/George H. King"
GEORGE H. KING
United States Magistrate Judge

FILED FEB. 24 1993

Second Appellate District, Division Two, No. B056366
S030469

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent,

v.

TROY ISAIAH MITCHELL, Appellant.

Appellant's petition for review DENIED.

"s/ LUCAS ,
Chief Justice

FILED: Nov. 25, 1992

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE	)	
	)	No. B056366
Plaintiff and Respondent,	)	
	)	(Super. Ct.No.
	)	BA010253)
v.	)	
	)	
TROY ISAIAH MITCHELL,	)	
	)	
Defendant and Appellant.	)	
_____	)	

Statement of the Case

Jerry "Judabean" Knox (victim) died after being shot several times and run over by a vehicle. Appellant was charged with murder (Pen. Code, § 187 (a).). It was also alleged that appellant personally used a firearm. A jury convicted him of second degree murder. The jury did not find the personal use allegation to be true, nor did they find that appellant was the driver of the vehicle that ran over victim.

Facts of the Case

Maurice Taylor (a Four Tray Hoover Crips gang member) told police, in the few days after the victim was murdered, that appellant (a Rolling Forties Crips gang member) yelled "Fuck Hoovers" in the direction of the victim (a Four Tray Hoover Crips gang leader). The victim was in the street in front of appellant's apartment building at the time. In response to this insult, the victim, two other people (Eight-Ball and Big Black), and Taylor

ran up to appellant's apartment and a fist fight ensued in which the victim was fighting with appellant. Shortly after the fight was over, Taylor saw appellant and three other Rolling Forty Crips get into a vehicle which drove by the spot where Taylor and his friends were. Someone in the car yelled out "Neighborhood Rolling Forty Crips" and appellant leaned out of the window and fired four times hitting Big Black in the leg and the victim in the arm.

At trial Taylor testified that he had lied to the police. He never saw appellant yell anything. He never saw the victim fighting with appellant. He only heard two shots after which he saw that "Big Black got shot in the ankle, and Judabean got shot in the shoulder." He didn't see who shot them.

Taylor also testified that his own gang would consider him a snitch and probably kill him if he helped the police, even though appellant was in a rival gang. He said that when he got out of prison that he planned to live at a location which is within Rolling Forties territory and

if he testified against appellant there "would be another war."

> In his trial testimony, Taylor said that after the first shooting he and Eight-Ball took Big Black to the hospital and the victim went home. When he returned from the hospital the victim was back out in the street but by this time he had been shot several more times, run over by a car, and was dead.

Kimberly Johnson was the victim's girlfriend. She was taking the victim to the hospital after he had been shot in the arm. As they passed appellant's apartment, she saw several people near appellant's apartment and a "real long black gun" sticking out over the balcony. The victim told her to stop and he exited the vehicle. The victim yelled out, "I dare you to shoot me". The men on the balcony started shooting. The victim fell to the ground and the shooting continued. The men came down the stairs and started shooting at her vehicle so she drove away.

Maria Valdivia lived across the street from appellant. At the time of the first shooting (in which the victim was shot in the arm), she heard a shot. When she looked outside she saw people running and one of them had his foot raised and was being carried by two others. Later that night, at the time of the second shooting (in which the victim was killed), she saw appellant and another man on the balcony shooting down. They were soon joined by eight or nine other men who all were shooting down. At that moment she saw the victim fall to the ground. Everyone then began to run and she saw appellant get into a car. That car drove down the street and ran over victim.

An autopsy revealed that in addition to the first gunshot wound to the arm that had been bandaged, the victim sustained non-fatal wounds to the arm and leg and one fatal wound to the neck. The bullet that entered the victim's neck struck his spinal cord in such as manner that it would have caused immediate paralysis from the middle

of the chest down. The medical examiner said that if the victim had not been run over and if he had received medical attention, its possible that he could have survived the neck wound. The victim's cause of death was determined to be gunshot wounds and blunt force trauma (from the vehicle).

Investigating officers found 54 shell casings at the scene.[1/] The casings were of three different calibers, .22, .45, and 9mm. Seventeen casings were found on the staircase of appellant's apartment.

Discussion

I.

Appellant concludes, from the jury's findings that the allegations of personal firearm use and driving of the vehicle were not true, that their verdict of guilty must be based on an aiding and abetting theory, and then argues

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1. In addition to this victim, four other people were hit by the gunfire including Mrs. Valdivia's son, who was shot twice, and a 17-year old friend of his from school who was killed.

that there was insufficient evidence that appellant aided and abetted the murder of victim. Appellant opines that because the jury did not find beyond a reasonable doubt that appellant personally used a firearm in the commission of the murder and did not find beyond a reasonable doubt that appellant drove the vehicle that ran over the victim, that the jury necessarily did not believe the testimony of Mrs. Valdivia. Therefore, appellant postulates, "[t]here was no evidence, either direct or circumstantial, from this witness to support the aiding and abetting theory. This deduction is flawed. The testimony from Mrs. Valdivia was that appellant was one of eight or nine people on the balcony at the time the victim was shot and that "[t]hey all fired, I would imagine at the same time, because it was tremendous firing. At that moment I saw that someone (the victim) fell to the ground." As to the vehicle, which was parked in a dark area, Mrs. Valdivia said, "Then he ran and he got into the car. He started the car very quickly and he made a turn and he ran with the car over

the boy." She also testified that she thought another person got into the same car. The fact that the jury was unable to find beyond a reasonable doubt that appellant personally used a firearm in the commission of the murder or that he was the driver of the vehicle based on this testimony is not difficult to understand. These findings by the jury, however, do not lead to the inescapable conclusion that "the jury did not believe her testimony at all" as appellant contends. Credibility of the witnesses and the weight to be given their testimony is a determination for the jury. (Evid. Code, § 312.) In addition to Mrs. Valdivia's testimony, the jury had the evidence of Taylor's original statements to the police, the corroborating testimony of Ms. Johnson, and the physical evidence of 17 shell casings found on staircase of appellant's apartment. There was substantial evidence to support the jury's verdict.

II

Appellant's second contention is that the court erroneously instructed the jury which deprived him of due process.

The jury asked a question regarding aiding and abetting.[2/] The court told the jury that it was not going to answer the question as presented, but instead responded to the question by giving an additional instruction. Although the court stated at that time "I talked to the attorneys and this is what we're going to state", we need not discuss a waiver of any defect because none exists. The court began its additional instruction as follows: "If you find the defendant let or allowed firearms into his apartment with the intent and mental state as defines murder of the first or second degree, then the answer to your question is yes, which means that if you

---

2. ". . . is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequence (murder) if he allows/or facilitates or promotes the introduction of deadly firearms into his home?"

found that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first or second degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no." (Emphasis added.) The court then referred the jury to CALJIC instructions 3.00 (principals defined), 3.01 (aiding and abetting defined), 3.02 (principals liability for natural and probable consequences), 3.31 (specific intent) and 3.31.5 (mental state).

Appellant argues that, by its use of the term 'allow', "[e]ssentially, the court told the jury that appellant was strictly liable for the consequences of someone entering his house with firearms, and the jury did not need to determine whether appellant had the requisite intent for aiding and abetting." It is difficult to conceive how appellant can start with this record and arrive at the conclusion that the jury was told that they could find guilt

without intent. If appellant is arguing that the requisite intent for aiding and abetting includes an intent to encourage, assist, or facilitate, but does not include the intent to actually commit the crime, then appellant is simply wrong. (People v. Beeman (1984) 35 Cal.3d 547, 561; People v. Cooper (1991) 53 Cal.3d 1158, 1164). If appellant is arguing that the jury might misinterpret the instruction to mean that appellant could only be found guilty on an aiding and abetting theory if he had the intent to actually commit the murder, then appellant has failed to explain to us how he was prejudiced by the court's failure to instruct on two additional theories of guilt. Appellant's contention on this issue is utterly devoid of merit.

III

Appellant next argues that the court erred when by modifying CALJIC 2.50. The modification was the removal of the term conspiracy and inserting instead " . . . an

agreement, aiding and abetting and/or unlawful purpose." The record is clear that the prosecution wanted the term conspiracy to remain and to further have the court instruct on conspiracy. Appellant did not want this, and the court proposed this modification, with which appellant was in agreement. Again, however, we need not discuss the fact of a waiver, because the instruction as modified was proper. Appellant's argument, in essence, is that conspiracy is a crime while aiding and abetting is simply a theory of liability. Therefore, "using other crimes evidence to show aiding and abetting does not follow, since aiding and abetting is not itself a crime." Appellant's contention is meritless. CALJIC 2.50 allows the use of evidence of other crimes for the limited purpose of determining if it tends to show intent, identity, motive, knowledge, etc. None of these things are crimes. The fact that the court substituted something that is not a crime in place of conspiracy, which is a crime, has absolutely no bearing on its propriety. Turning to the instruction itself, use of

evidence of other crimes which "tend[s] to show . . . the existence of an agreement, aiding & abetting, and/or unlawful purpose," is simply another way of saying it can be used if "the crime charged is part of larger continuing plan, scheme or conspiracy." Such use of other crime evidence has specifically been approved. (CALJIC 2.50; Evid. Code, § 1101; People v. Haslouer (1978) 79 Cal.App.3d 818.)

IV

Appellant next contends that he was denied effective assistance of counsel. In support of this contention appellant states that trial counsel failed to object to the giving of the modified version of CALJIC 2.50 and, also, failed to object to prosecutorial misconduct during final argument. As relates the first contention, its clear from the record that trial counsel preferred this modified instruction to the unmodified version which, as the trial court alluded to, the prosecution was probably entitled to. There would, therefore, be no reason to object. Also, for

the reasons discussed above, the instruction was proper. As to the second contention, appellant cites nothing in the record to support the claim of prosecutorial misconduct in closing argument. Respondent pointed this deficiency out to appellant in its response brief but appellant's reply brief does not address this defect. In order to evaluate appellant's claim of insufficiency of the evidence, we reviewed the record of the evidence in this case. Argument is not evidence. We, therefore, were not required to review it. In light of the apparent fact that appellant is unable to find any misconduct in the argument, there is no need for us to look however, in the

interest of justice, we did review the argument and we find no misconduct.

The judgment is affirmed.

NOT TO BE PUBLISHED.

"s/ J. D. Lord , J.
J. D. LORD*

We concur:

"s/ Fukuto , Acting P.J.
FUKUTO

"s/Nott , J.
NOTT

* Assigned by the Chairperson of the Judicial Council.

FILED MAY 1 1997

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TROY ISAIAH MITCHELL,	)	
	)	No. 94-55990
Petitioner-Appellant,	)	
	)	D. C. No.
v.	)	CV-93-05796-RG(GHK)
	)	
K. W. PRUNTY, Chief Deputy Warden,	)	
	)	**ORDER**
Respondent-Appellee.	)	
	)	

KOZINSKI, Circuit Judge.

Respondent's motion for a recall and stay of the mandate is denied.

Supreme Court, U.S.
FILED
SEP 8 1997
CLERK

No. 97-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT AYERS, JR., Warden,

Petitioner,

v.

TROY ISAIAH MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the rules in *United States v. Powell*, 469 U.S. 57 (1984), and *United States v. Watts*, 117 S. Ct. 633 (1997), which were developed in the context of general jury verdicts, be imposed on the fundamentally different special finding, effectively eradicating the very purpose of special findings?

2. Does *Teague v. Lane*, 489 U.S. 288 (1989), apply to a case that does not break new ground or impose new obligations on a bedrock element of criminal procedure?

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INTRODUCTION

Respondent Troy Isaiah Mitchell ("Mitchell") respectfully opposes the petition for writ of certiorari ("Petition") filed by Warden Robert Ayers, Jr. (hereinafter, the "State"). The Ninth Circuit Court of Appeals' decision to grant Mitchell's habeas corpus petition was based on well-established law and did not create a conflict among the circuits. In a desperate attempt to create an issue worthy of certiorari review where none exists, the State presents an argument that is predicated on the fundamental false premise that a special finding is the same as a general acquittal. Once this misconception is exposed, the State's Petition collapses.

STATEMENT OF THE CASE

On July 11, 1989, Jerry Knox was killed after being shot by gang members and run over by a getaway car. The murder occurred outside of Mitchell's apartment. On January 23, 1990, the Los Angeles County District Attorney charged Mitchell, and only Mitchell, with the first degree murder of Knox.

The case against Mitchell was based on allegations that Mitchell was the direct perpetrator of the murder; that is, that Mitchell used a gun and/or struck Knox with a car. As the prosecutor told the jury:

> In order for the people to prove this case you have to believe either that the defendant was at

> some point pointing a gun at Jerry Knox, and/or firing it, or drove over him in that car.[1]

At trial, the parties presented conflicting evidence of Mitchell's involvement in the gang shooting and the hit-and-run, as well as of the actual cause of Knox's death. Concerned that the complexity of the facts might give rise to an ambiguous guilty verdict, the trial court recommended that a special verdict form be given to the jury so that the "Court of Appeals would know whether or not the jury felt [Mitchell] did one or both of the acts that caused the death, to wit, shooting from the balcony, and/or driving the vehicle and running him over."[2] Both the District Attorney and Mitchell's counsel agreed to the court's suggestion that the jury be asked to render special findings.

At the conclusion of the case, the jury deliberated for four days. On the fourth day of deliberations, the jury requested further instruction from the court on the law of aiding and abetting.[3] Seventy-five minutes after receiving

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[1] RT 609:1-4.

[2] RT 461:10-15.

[3] The jury's note to the court read:

> We, the jury in the above entitled action, request the following:
> Further instruction on the meaning of "to aid and abet." Specifically, is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequences (murder) if he allows or, facilitates or promotes the introduction of deadly firearms into his home.

Court's Exhibit B.

an additional instruction, the jury returned a verdict of guilty on the charge of second degree murder. However, in its special findings, the jury found that Mitchell had not used a firearm and that Mitchell had not driven the car that ran over Knox.[4] Accordingly, the jury found that Mitchell did not commit either of the acts that caused Knox's death.

After unsuccessfully pursuing state court remedies, Mitchell filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. Mitchell claimed that there was insufficient evidence to sustain his murder conviction insofar as the jury found not true the facts giving rise to direct perpetrator liability. In light of the jury's special findings rejecting the direct perpetrator theory advanced by the State at trial, on habeas review the State defended the jury's verdict by explaining that the jury must have found that Mitchell aided and abetted Knox's murder by allowing Mitchell's balcony to be used by the person or persons who shot Knox. The district court, adopting the findings, conclusions and recommendations of a magistrate judge, denied Mitchell's habeas corpus petition.

Mitchell appealed the denial of his habeas petition to the Ninth Circuit Court of Appeals. Once again, the State attempted to defend the jury's verdict on an aider and abettor theory. The Ninth Circuit, in a published decision authored by Judge Kozinski, rejected the State's argument and reversed the district court's denial of the petition, holding that the prosecution had failed to present sufficient evidence to support Mitchell's conviction. The

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[4] CT 207, 210; RT 637:10-24.

Ninth Circuit reasoned that because the jury found that Mitchell neither fired any of the bullets that struck Knox nor drove the vehicle that hit Knox, Mitchell could be guilty of Knox's murder, if at all, only as an aider and abettor.[5] The only evidence in the record even related to this one remaining theory of liability was Mitchell's relationship with gang members and his presence near the scene of the crime. Holding that evidence of gang affiliation and mere presence at the scene of the crime, without more, is insufficient to support a conviction for aiding and abetting a murder, the Ninth Circuit overturned Mitchell's conviction.

In a petition for rehearing, the State attempted for the first time to justify the jury verdict on a direct perpetrator theory of liability. This theory of liability was novel to the habeas corpus proceedings to that point; it had not been raised before the magistrate judge, the district court, or the Ninth Circuit in the first instance. In its petition for rehearing, the State raised for the first time the two arguments that it now raises in its Petition before this Court. First, the State argued that despite the jury's special findings to the contrary, the jury could have found Mitchell liable as a direct perpetrator. In an attempt to support this argument, the State cited to cases dealing not with special jury findings, but with inconsistent general

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[5] *Mitchell v. Prunty*, 107 F.3d 1337, 1340 (9th Cir. 1997), *amended, reh'g en banc denied*, No. 94-5590, 1997 U.S. App. LEXIS (9th Cir. Apr. 10, 1997), *petition for cert. filed*, No. 97-77 (July 8, 1997) (hereinafter *Mitchell*). The Ninth Circuit's opinion in *Mitchell* is attached as Appendix A to the State's Petition.

verdicts. Second, the State argued that in conducting the sufficiency-of-the-evidence review, the Ninth Circuit should have considered evidence directly contrary to the jury's special findings. Once again, the State cited cases for this proposition wrested out of the context of general jury verdicts.

The Ninth Circuit did not require Mitchell to respond to the State's arguments raised for the first time in its petition for rehearing. Rather, the Ninth Circuit denied the petition for rehearing and amended its opinion by summarily dismissing in a footnote the State's unsupported argument:

> In its petition for rehearing, the state for the first time urges us to ignore [the jury's] findings in determining whether the evidence presented at trial was sufficient to convict. It states: "[I]t is ... possible the jury was convinced of petitioner's guilt as a direct perpetrator ... even though they did not find petitioner personally used a firearm, and found he was not the driver of the car." Petition for Rehearing at 7. After all, the government explains, "seemingly inconsistent verdicts do not indicate the prosecutor failed to prove all the essential elements of the offense." *Id.*
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> In support of its argument, the state points to *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L.Ed.2d 461 (1984); *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), *cert. denied*, --- U.S. ---, 117 S. Ct. 961, 136 L.Ed.2d 847 (1997); and *United States v. McKinney*, 88 F.3d 551 (8th Cir. 1996). But these cases stand

> for an altogether different proposition: that in reviewing the sufficiency of the evidence on one count, acquittals on other, related counts, are not conclusive. *See Powell*, 469 U.S. at 67, 105 S. Ct. at 478 ("Sufficiency-of-the-evidence review ... should be independent of the jury's determination that evidence on another count was insufficient."); *Shenberg*, 89 F.3d at 1470 ("[N]either the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions."); *McKinney*, 88 F.3d at 555 ("Appellate review of a conviction on one count ... takes place independent of the jury's determination that evidence on another count was insufficient." (internal quotation omitted)). This is true as a simple logical matter; an acquittal is not proof of *any* predicate fact.
>
> Special findings, by contrast, are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights.[6]

In so rejecting the State's novel argument, the Ninth Circuit drew the logical and legally sound distinction between general jury verdicts and special findings. All of the cases cited by the State -- both in its petition for

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[6] *Mitchell*, 107 F.3d at 1339 n.2.

rehearing before the Ninth Circuit and in its Petition before this Court -- are drawn from the context of general jury verdicts. The State's cases stand for the unremarkable -- and in this case, irrelevant -- proposition that general verdicts of acquittal are not findings of fact, and that consequently an acquittal on one count has no effect on a conviction on another count. As the Ninth Circuit recognized, however, and as all relevant federal precedent dictates, special jury findings are fundamentally different from general verdicts. The Ninth Circuit did nothing more than give effect to those special findings. The Ninth Circuit's procedure in no way conflicts with the precedent of this Court or the law of other circuits.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S TREATMENT OF THE JURY'S SPECIAL FINDINGS IS CONSISTENT WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

In its review of the single count charged against Mitchell, the Ninth Circuit held that the jury's special findings that Mitchell had not used a firearm and had not driven the car that ran over the victim were "dispositive of the questions put to the jury."[7] Because these special findings precluded a conviction based on a theory of direct perpetrator liability, the Ninth Circuit examined whether there was sufficient evidence for a rational jury to convict on the only remaining theory of liability -- aiding and abetting. The Ninth Circuit then analyzed

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[7] *Mitchell*, 107 F.3d at 1139 n.2.

whether the evidence not rejected by the jury in its special findings was sufficient to support the conviction. The relevant caselaw supports the procedure followed by the Ninth Circuit.

A. The Special Finding Is A Unique Procedural Mechanism Whereby A Jury Makes Findings Of Fact And Announces The Theory Of Liability On Which Its Conviction Is Based.

Special findings by juries are little known and infrequently used in federal courts because of concerns that a defendant's right to an unfettered jury trial might be compromised by allowing a judge to ask the jury questions directly related to the verdict.[8] However, in certain circumstances, special findings are used to allow juries to make ultimate determinations of fact and to choose among competing theories of liability. Such special findings are used to avoid the ambiguity that may result from the use of general verdicts alone.

For example, special findings have been implemented in conspiracy cases to allow the jury to definitely establish, as fact, whether a defendant had actually withdrawn from a conspiracy on a specified date.[9] Courts have also suggested that special findings be used to allow juries to

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[8] *See United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

[9] *See, e.g., United States v. Stassi*, 544 F.2d 579, 584 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976); *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957).

make findings of fact regarding the object of a conspiracy, where the sentence to be imposed might differ according to that object.[10] In these situations, such special findings allow the jury to speak beyond their general verdict to prevent "ambiguous verdicts of guilty with two possible alternative interpretations."[11]

Similarly, many courts use special findings in complex RICO cases to clarify for appellate courts "the specific offenses the jury relied upon in reaching its verdict."[12] In these cases, special interrogatories are used "to indicate, for the purpose of a potential appeal, which predicate acts the jury had found to be proven so as to satisfy the RICO statute's pattern of racketeering requirement."[13]

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[10] *See, e.g.*, *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *Newman v. United States*, 817 F.2d 635, 637-38 (10th Cir. 1987); *United States v. Dennis*, 786 F.2d 1029, 1038 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Brown v. United States*, 299 F.2d 438, 439-40 (D.C. Cir.), *cert. denied sub nom.*, *Thornton v. United States*, 370 U.S. 946 (1962).

[11] *Owens*, 904 F.2d at 415.

[12] *United States v. Bertoli*, 854 F. Supp. 975, 1069 (D.N.J. 1994); *see also United States v. Pungitore*, 910 F.2d 1084, 1136 n.74 (3d Cir. 1990), *cert. denied sub nom.*, *Scarfo v. United States*, 500 U.S. 915 (1991); *United States v. Palmieri*, 630 F.2d 192, 203 (3d Cir. 1980).

[13] *Bertoli*, 854 F. Supp. at 1069.

Special findings are often used to allow the jury to indicate the theory of liability upon which it relied in rendering its verdict. In *United States v. Melvin*,[14] the First Circuit authorized the use of special findings for a jury to identify the incriminating conduct in which it found the defendant to have engaged, where the statute at issue established varying penalties depending on the acts committed. Similarly, in *United States v. North*,[15] the D.C. Circuit upheld a guilty verdict and special findings that specified the theory of liability that the jury relied on in convicting the defendant of falsifying and destroying documents.

Finally, in *United States v. Miller*,[16] the Tenth Circuit held that special findings could and should be used to allow the jury to announce the theory of liability upon which it relies. In *Miller*, the defendant was convicted under a statute that allowed for two potential theories of liability. After the conviction and prior to the review, one of those theories had been invalidated by this Court.[17] In determining whether the conviction was supported by sufficient evidence, the *Miller* court, unlike the Ninth

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[14] 27 F.3d 710, 716 (1st Cir. 1994).

[15] 910 F.2d 843, 911 (D.C. Cir. 1990).

[16] 84 F.3d 1244 (10th Cir.), *cert. denied sub nom.*, *Hicks v. United States*, 117 S. Ct. 443 (1996), *and overruled in irrelevant part by United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997), *petition for cert. filed*, No. 97-5648 (Aug. 18, 1997).

[17] *Miller*, 84 F.3d at 1257 (noting that this Court in *Bailey v. United States*, 116 S. Ct. 501 (1995), had rejected one of two possible statutory theories of liability).

Circuit in *Mitchell*, did not have special findings that shed light on the jury's thought process. The *Miller* court, overturning the conviction for insufficiency of the evidence because it could not determine whether the jury relied on the invalid theory of liability, noted that a jury's "special verdict indicating it rejected the legally erroneous ground" would have allowed the court to be "absolutely certain that the jury did not make such an unwitting error."[18]

As the foregoing cases indicate, the courts in almost every circuit allow use of special jury findings to reduce the ambiguity of a general verdict. Through its special findings, the jury makes findings of fact and speaks beyond its general verdict to specify the theory of liability on which its verdict is based.

B. The Ninth Circuit In *Mitchell* Gave The Proper Effect To The Jury's Special Findings.

As the trial court found in this case, Mitchell's trial was a factually complicated one that presented an unusual question of causation. For the expressed purpose of eliminating any "ambiguity in the verdict," the trial court submitted special interrogatories to the jury so that, if convicted, the "Court of Appeals would know whether or not the jury felt he did one or both of the acts that caused the death."[19] Mitchell's jury specifically found that he did not do either.

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[18] *Miller*, 84 F.3d at 1257.

[19] RT 461:10-15.

Unlike the case in *Miller*, the jury in Mitchell's trial provided the Ninth Circuit with findings that would allow it to be "absolutely certain" which theory of liability the jury relied on in returning a guilty verdict. The Ninth Circuit, in accordance with the procedure utilized in other circuits as discussed above, merely gave effect to those special findings. The Ninth Circuit was not errant in holding that those special findings "were dispositive of the questions put to the jury"[20] and in subsequently analyzing whether the evidence that did not conflict with the jury's special factual findings was sufficient to support the only remaining theory of liability.

II. THE CASES CITED BY THE STATE ARE INAPPLICABLE BECAUSE THEY DEAL WITH GENERAL VERDICTS RATHER THAN SPECIAL FINDINGS.

A. Special Findings Are Fundamentally Different From General Verdicts.

In its attempt to create a conflict worthy of certiorari review, the State asks this Court to ignore the directly relevant caselaw, and instead, to impose rules applicable to an entirely different area of law. The State claims that the Ninth Circuit's reliance upon special findings in its sufficiency of the evidence review is "*the equivalent* of a refusal to consider the facts underlying counts in which a defendant has been acquitted in determining whether

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[20] *Mitchell*, 107 F.3d at 1339 n.2.

their [sic] was sufficient evidence to support guilty findings on other counts."[21]

The State's entire "equivalence" argument is fundamentally flawed. It hinges on the false assumption that a special finding by a jury is the same as a general acquittal. The State fails to offer this Court any relevant authority to support such an assumption. In fact, in its entire Petition, the State does not cite to a single federal case in which a special finding is discussed.[22]

Contrary to the State's unfounded claim that a special finding is "the equivalent" of a general acquittal, the very nature of special findings dictates that they are fundamentally different from general acquittals. While a general

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[21] Petition at 10 (emphasis added).

[22] In arguing that the Ninth Circuit is in conflict with this Court and other *federal* courts, the State throws one California case into the mix. *People v. Santamaria*, 8 Cal. 4th 903, 884 P.2d 81, 35 Cal. Rptr. 2d 624 (1994), is the only case cited in the State's entire petition that addresses the issue of special jury findings. Even this case, however, is not relevant to the issue decided by the Ninth Circuit because it dealt with the collateral estoppel effect of a sentence enhancement allegation.

Moreover, any conflict between *Mitchell* and *Santamaria* would not warrant certiorari review. Except in the most extreme circumstances, this Court has generally deferred to the judgment of the circuits in cases of conflicting views between a state court and a circuit court. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

acquittal "is not a finding of any fact,"[23] a special finding is precisely that. As noted above, special findings are used in rare circumstances where actual findings of fact or a clear indication of the theory of liability relied on are desired. Courts therefore consistently draw a distinction between general verdicts and special findings.[24]

B. Cases Dealing With General Verdicts Are Irrelevant To The Issues Decided By The Ninth Circuit, And Therefore *Mitchell* Is Not In Conflict With The Precedent Of This Court Or Of the Courts Of Appeals.

The cases cited by the State in its Petition are not relevant to any of the issues decided by the Ninth Circuit. They stand for two general principles, neither of which is called into question by the Ninth Circuit's opinion in *Mitchell*: first, that inconsistent *general verdicts* on *separate counts* do not require reversal; and second, that a *general verdict of acquittal* is not a finding that the defendant did not do the acts charged, and therefore does not affect the sufficiency-of-the-evidence review on a *separate charge*. The cases standing for these propositions do not demon-

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[23] Petition at 7 (summarizing the holding in *United States v. Watts*, 117 S. Ct. 633 (1997)).

[24] *See, e.g.*, *Miller*, 84 F.3d at 1257 (drawing distinction between general verdict and special finding); *Owens*, 904 F.2d at 414-15 (suggesting use of special finding as opposed to general verdict); *Orozco-Prada*, 732 F.2d at 1076 (same); *Newman*, 817 F.2d at 637-38 (10th Cir. 1987) (same); *Dennis*, 786 F.2d at 1038 (same); *Quicksey*, 525 F.2d at 341 (same); *Brown*, 299 F.2d at 439-40 (same).

strate that the Ninth Circuit erred or created a conflict among the circuits, because this case, unlike those cited by the State, involves *special findings* by a jury with respect to a *single count*.

In *United States v. Powell*,[25] on which the State principally relies, the jury convicted the defendant of a compound crime, but acquitted the defendant on counts charging the predicate acts. Prior to *Powell*, this Court had held in *Dunn v. United States*[26] that consistency among verdicts on separate counts is not necessary, because res judicata would not bar inconsistent verdicts between separate indictments. The *Powell* Court, drawing on *Dunn*'s rationale, reasoned that courts cannot be called upon to determine which of two inconsistent general verdicts the jury "really meant," because "such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the deliberations that courts generally will not undertake."[27]

The Ninth Circuit in *Mitchell* did not undertake such a speculative inquiry, because it did not have to. The jury, through its *special findings*, clearly and explicitly told the court and the parties, who stipulated to the use of the special findings, the theory of liability on which it relied in determining Mitchell's guilt on the single count being tried. As discussed above, special findings are used for precisely this purpose; they allow courts to determine the

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[25] 469 U.S. 57 (1984).
[26] 284 U.S. 390 (1932).
[27] *Powell*, 469 U.S. at 66.

theory on which a conviction is based *without* having to speculate as to the meaning of a general verdict. Given the jury's special findings, the Ninth Circuit properly concluded that the jury's conviction was based on an aider and abettor theory of liability.

Powell and *United States v. Watts*[28] likewise do not conflict with the Ninth Circuit's sufficiency-of-the-evidence review. The well-settled principle that a general verdict is not a finding of any fact, and that consequently an acquittal on one count does not affect the sufficiency-of-the-evidence review on a separate count, has no application here. While general verdicts are not findings of fact, special findings are precisely that. Indeed, *Watts*, one of the cases principally relied upon by the State, makes this clear:

> "An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. *Without specific jury findings, no one can logically or realistically draw any factual finding inferences* . . . ."[29]

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[28] 117 S. Ct. 633 (1997).

[29] 117 S. Ct. at 637 (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)) (emphasis added).

In contrast, in this case, where there *were* specific jury findings, factual finding inferences can and must be made, otherwise the special findings have no effect.[30]

As discussed above, courts routinely utilize special findings to resolve issues of fact. If, as the State suggests in its Petition, rules related to general verdicts on separate counts were lifted out of the context in which they were developed and applied to special findings, the special finding device would be effectively eradicated. No longer would courts be able to avoid ambiguous jury verdicts by asking the jury to make specific findings of fact or to announce the theory of liability on which it relied. Countless verdicts would need to be struck down and sentences vacated because courts would be stripped of their ability to elicit less ambiguous verdicts from juries.

In sum, the State asks much of this Court. The State suggests that this Court should ignore relevant caselaw, and instead, impose on special findings rules fashioned for the general verdict -- a fundamentally different device. The State also asks that this Court overlook the nullifying effect that imposing this rule would have on special

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[30] All of the cases cited by the State are also distinguishable because in every one of those cases, the courts considered the effect of general verdicts on *multiple counts*. In contrast, Mitchell was charged with a *single count*, and the special findings at issue went *directly* to that single count. It would be illogical to preclude consideration of factual findings related to a single count in an analysis of the sufficiency of the evidence supporting that count.

findings. In support of its argument, the State cites to no relevant cases.

II. *TEAGUE V. LANE* IS INAPPLICABLE BECAUSE THE NINTH CIRCUIT DID NOT ANNOUNCE A NEW RULE OF LAW IN *MITCHELL*.

The State argues that the Ninth Circuit created a "new rule" in *Mitchell* that should not be applied retroactively to Mitchell under *Teague v. Lane*.[31] This argument is without merit for two reasons. First, the Ninth Circuit did not create a "new rule" as defined in *Teague*, and therefore the non-retroactivity rule established in *Teague* is not applicable. Second, even if the Ninth Circuit had announced a new rule in *Mitchell*, this case would fall squarely within the "fundamental fairness" exception established in *Teague*.

As discussed above, the Ninth Circuit was in line with other federal courts in its treatment of the special findings made by the jury. Thus, the Ninth Circuit neither broke new ground nor imposed any new obligations by treating special findings in the same manner that other federal courts have done. The Ninth Circuit's ruling was "dictated by precedent existing at the time [Mitchell's] conviction became final,"[32] and *Teague* is therefore not applicable.

Teague would not apply in any event because the Ninth Circuit's holding falls within the "fundamental fairness" exception set forth in *Teague*. Giving legal effect to the jury's special findings is clearly a "bedrock proce-

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31 489 U.S. 288 (1989).

32 *Teague*, 489 U.S. at 301.

dural element" that is "central to an accurate determination of innocence or guilt."[33] The jury in this case made findings of fact that clearly established the theory of liability on which its verdict was based; to disregard those findings now would deprive Mitchell of his fundamental right to a jury trial. As the Ninth Circuit noted in summarily dismissing the State's arguments, "Having agreed to the [special verdicts], the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights."[34]

As such, *Teague* is not applicable here and this Court should not undertake certiorari review of the Ninth Circuit's decision in *Mitchell*.

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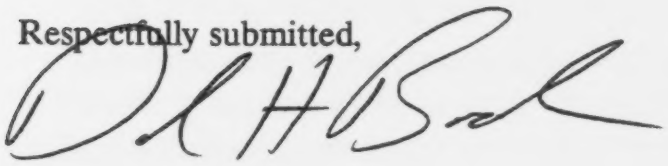
[33] *Teague*, 489 U.S. at 311, 313.

[34] *Mitchell*, 107 F.3d at 1339 n.2.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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